



## INTERIOR BOARD OF INDIAN APPEALS

Estate of Dennis G. McCrea

41 IBIA 206 (09/15/2005)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

ESTATE OF DENNIS G. McCREA : Order Affirming Decision  
:   
: Docket No. IBIA 03-112  
:   
: September 15, 2005

This is an appeal from a May 9, 2003, Order Denying Petition for Rehearing by Administrative Law Judge William E. Hammett (ALJ) in the estate of Dennis G. McCrea (Decedent), deceased Colville Indian, Probate No. IP SA 41 N 02. Appellants Chris Jurgensen and Linda J. Nee, husband and wife, seek payment of \$1,100 from the estate for the alleged balance due for work done by Mr. Jurgensen in connection with logging of Decedent's allotment on the Colville Reservation in Washington State. The ALJ denied the claim. For the reasons stated below, the Board of Indian Appeals (Board) affirms the denial of Appellants' claim.

Decedent died intestate on October 10, 2000. On September 16, 2002, the ALJ held a hearing to determine the heirs and settle Decedent's estate. At the hearing, Ms. Nee testified that in the summer of 1999 Decedent — who was a neighbor of Mr. Jurgensen — asked Mr. Jurgensen to log his property, using equipment owned by Mr. Jurgensen, and that Mr. Jurgensen had said he would do it for \$400 a day. Ms. Nee testified that she was present at and heard this conversation and that there was nothing in writing on the agreement. She stated that it took Mr. Jurgensen four days to complete the work so that Appellants were owed \$1,600 for the work, but that Decedent had paid them only \$500. She testified that \$400 a day was a reasonable amount for the work performed and was the amount Mr. Jurgensen had previously charged others for the same type of work.

The ALJ asked Decedent's son, Shane McCrea, if he objected to the claim and he responded, "No, I guess not," stating that he did not know enough about his father's actions before his passing. Sept. 16, 2002, Transcript at 3.

On November 27, 2002, the ALJ issued an Order Determining Heirs that denied all claims against the estate and ordered its distribution to Decedent's son, Shane McCrea. With respect to Appellants' claim, the ALJ found that the claim was "unsupported by a contract or any other document in writing which shows that [Decedent] contracted for such services" and

that the claim was objected to by Decedent's heir, Shane McCrea. The ALJ concluded that there was an "absence of evidence to support the claim" and denied the claim in full.

Appellants filed a timely Petition for Rehearing of the November 27, 2002, decision. Appellants attached three statements. Two of the statements, one signed by a Bureau of Indian Affairs (BIA) forestry technician and the other by an employee of the company that purchased Decedent's timber, attested to the scope, nature, and quality of logging work done by Mr. Jurgensen for Decedent. The third statement, signed by a BIA assistant forest manager, discussed the amount typically charged for the performance of such work, which was within the range of what Appellants claim to have charged. In their rehearing petition, Appellants asserted that the work was done pursuant to an oral agreement that was binding under Washington law; that the work done was costly, dangerous, and well performed; and that it would be unfair not to reimburse the individuals who performed it. Appellants also declared that Shane McCrea had not objected to their claim at the hearing. No party filed a response to the petition.

On May 9, 2003, the ALJ issued an Order Denying Petition for Rehearing. The order concluded that it was irrelevant whether Shane McCrea objected to the claim because the ALJ is charged with Secretarial responsibility to preserve trust assets and can perform that responsibility whether or not interested parties object to claims against an estate. The order then denied the petition for "any or all" of three reasons: (1) the petition did not state why the new evidence offered was not available at the time of the hearing; (2) the claim was not a liquidated claim and therefore was properly barred from federal collection under 43 C.F.R. § 4.250; and (3) the timber cut by petitioners was in trust status on trust land and any transaction involving such property required the written approval of the Secretary of the Interior through her delegated authority.

On June 20, 2003, Appellants filed a timely appeal from the Order Denying Petition for Rehearing. Appellants relied on their notice of appeal as their opening brief, and no answer briefs were filed.

#### Discussion

In their notice of appeal, Appellants respond to the three reasons the ALJ identified for denying rehearing. First, Appellants declare that they did not submit documentary evidence at the hearing because they were unaware that they had to submit such evidence. Specifically, they state that the Probate Office at the Colville Agency, BIA, had advised them that they could submit a claim against the estate but did not instruct them that they had to provide "other evidence" at that time. Second, Appellants object to the characterization of their claim as "unliquidated" because they maintain they had an oral agreement to be paid \$400 a day, which Decedent did not live up to. Third, in response to the finding that a transaction involving timber cutting on trust property required the written approval of the Secretary's delegatee,

Appellants submitted Special Permit No. 99-336 issued to Decedent by BIA on August 12, 1999, which authorized the logging of 20,000 board feet of timber on his allotment.

The Board affirms the ALJ's decision on the ground that Appellants have not met their burden to establish the terms of their oral agreement with Decedent.

First, the ALJ did not err in declining to consider the evidence provided by Appellants with their rehearing petition. Appellants failed to comply with regulations requiring a party basing a rehearing petition partly on new evidence to state justifiable reasons for not providing the evidence at the hearings, see 43 C.F.R. § 4.241(a), and the reason they provide to the Board — that BIA failed to tell them they needed to submit documentary evidence — is not a justifiable reason. BIA has no duty to provide legal advice regarding the filing of claims against estates in probate proceedings.

Second, Appellants' claim fails even if the additional evidence proffered with the petition for rehearing is considered. The Board finds that, even considering this evidence, the evidence is insufficient to establish that Decedent agreed to pay Appellants \$1,600 for the work performed. It does appear, based on Ms. Nee's testimony and Decedent's payment of \$500 for the work completed, that Appellants had an agreement with Decedent that Mr. Jurgensen would do some work in exchange for some payment. The third party statements provided by Appellants with their rehearing petition, which discuss the scope and nature of the work performed by Mr. Jurgensen, further support Appellants' contention that some type of agreement existed between them and Decedent.

The only evidence of the actual terms of the agreement, however, was Ms. Nee's testimony, which is not consistent with the amount paid by Decedent. To be sure, Decedent's failure to pay the amount claimed by Appellants may represent nothing more than a breach of the parties' agreement. But in the absence of any other supporting evidence regarding the actual terms of the agreement between the parties, Ms. Nee's testimony is insufficient to sustain Appellants' burden of proof. Nor does the statement of the BIA assistant forest manager, which describes typical logging costs for work of the type performed by Mr. Jurgensen, help demonstrate the terms of the parties' agreement. Evidence as to the usual terms that normally would be included in a contract is inadmissible to establish the terms of a particular contract in the absence of any showing that the parties contracted with reference to such terms. See 17A C.J.S. Contracts § 593 (1963). Appellants have provided no evidence other than their own testimony that Decedent intended to pay the going rate. 1/

---

1/ Because the Board affirms the ALJ's decision on this basis, we need not and do not reach the questions of whether Appellants' claim is an unliquidated claim that could be barred pursuant to 43 C.F.R. § 4.250(f) or whether Decedent had obtained any necessary approvals to enter into an agreement with Mr. Jurgensen for the logging of Decedent's trust property.

### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms Judge Hammett's May 9, 2003, Order Denying Petition for Rehearing and his November 27, 2002, Order Determining Heirs.

I concur:

// original signed

Katherine J. Barton  
Acting Administrative Judge

// original signed

Steven K. Linscheid  
Chief Administrative Judge